FILE COPY

APR 3 1930

Supreme Court of the United States

OCTOBER TERM, 1929.

No. [illegible] //

JUNIUS C. KLEIN, - - - - - - - Appellant,

vs.

BOARD OF TAX SUPERVISORS OF JEFFERSON COUNTY, KENTUCKY, - - - - - - Appellee.

Appeal from the Court of Appeals of the State of Kentucky.

BRIEF FOR APPELLANT.

JUNIUS C. KLEIN,
JOHN P. HASWELL,
BLAKEY HELM,
EDMUND F. TRABUE,
Counsel for Appellant.

JOHN S. MILLIKEN,
Of Counsel.

WESTERFIELD-BONTE COMPANY, INCORPORATED, LOUISVILLE, KY.

SUBJECT INDEX.

PAGE

I. Statement of case 1

II. Jurisdiction of Court 4

Consolidated Turnpike Co. v. *Norfolk & Ocean Ry. Co.*, 228 U. S. 326.
Love v. *Griffith*, 266 U. S. 32.
Northern Pacific Ry. Co. v. *Department of Public Works, et al.*, 268 U. S. 39.
Louisville Gas & Elec. Co. v. *Coleman, Auditor*, 277 U. S. 32.
Quaker City Cab Co. v. *Pennsylvania*, 277 U. S. 389.
The Macallen Co. v. *Massachusetts*, 279 U. S. 620.
White River Lumber Co. v. *Arkansas*, 279 U. S. 692.
Farmers L. & T. Co. Ex'r v. *Minnesota*, 280 U. S. 204.
New Jersey Bell Tel. Co. v. *State Board*, 280 U. S. 338.

III. Findings of Law and Facts 4

IV. Assignments of Error 11

V. Argument 13

(a) Equalization 14

Louisville Interurban R. Co. v. *Greene*, 244 U. S. 499.

(b) Taxation of stock in the ratio of the property of the corporation held in the State of the stockholder's domicile to the entire property of the corporation held there and elsewhere... 16

Safe Deposit, &c., Co. v. *Virginia*, 280 U. S. 83.
Bethlehem Motors Co. v. *Flynt*, 256 U. S. 421.

PAGE

Ward Baking Co. v. *Fernandino*, 29 Fed. (2d) 789.
Campbell Baking Co. v. *City*, 19 Fed. (2d) 159.
Western Union Tel. Co. v. *Kansas*, 216 U. S. 1.
Pullman Co. v. *Kansas*, 216 U. S. 56.
Ludwig v. *Western Union Tel. Co.*, 216 U. S. 146.
Western Union Tel. Co. v. *Andrews*, 216 U. S. 165.
Southern Ry. Co. v. *Greene*, 216 U. S. 400.
International Paper Co. v. *Massachusets*, 246 U. S. 135.
Air-Way Electric Co. v. *Day*, 266 U. S. 71.
Hanover Fire Ins. Co. v. *Carr*, 272 U. S. 494, 508.
Alpha, &c., Co. v. *Massachusetts*, 268 U. S. 203, 216.
Frick v. *Pennsylvania*, 268 U. S. 473.
Rhode Island Trust Co. v. *Doughton*, 270 U. S. 69.
Looney v. *Crane*, 245 U. S. 178.
Cudahay Packing Co. v. *Hinkle*, 278 U. S. 460.

(c) Unsoundness of double or multiple taxation as shown by late decisions 27

Farmers L. & T. Co. Ex'r v. *Minnesota*, 280 U. S. 204, overruling *Blackstone* v. *Miller*, 188 U. S. 189.
Frick v. *Pennsylvania*, 268 U. S. 473.

(d) Assuming the propriety of taxing shares and also taxing the property of the corporation, the State of the shareholder's domicile has no right to arbitrarily discriminate between corporations and arbitrarily select those whose stockholders are to be taxed and omit to tax the stockholders of the others 29

PAGE

Cases invoked:

Stebbins v. *Riley*, 268 U. S. 137.
Air-Way Electric, &c., Co. v. *Day*, 266 U. S. 71.
Liggett v. *Baldridge*, 278 U. S. 105, 113.
Macallen v. *Massachusetts*, 279 U. S. 620.
Louisville Gas & Electric Co. v. *Coleman, Auditor*, 277 U. S. 32.
Quaker City Cab Co. v. *Pennsylvania*, 277 U. S. 389.
Bekins v. *Riley*, 280 U. S. 80, 82.

Cases discussed or distinguished:

Middendorf v. *Goodale*, 202 Ky. 118, 259 S. W. 59.
Louisville Gas & Electric Co. v. *Shanks*, Auditor, 213 Ky. 762 (Reversed 277 U. S. 32).
Siler v. *Board of Supervisors*, 221 Ky. 100, — S. W. —.
Klein v. *Board of Tax Supervisors*, 230 Ky. 182.
New York v. *Latrobe*, 279 U. S. 421.
International Shoe Co. v. *Shartel*, 279 U. S. 429.
White River L. Co. v. *Arkansas*, 279 U. S. 692.
Flint v. *Stone Tracy Co.*, 220 U. S. 107.

VI. Conclusion 55

VII. Appendix 57

TABLE OF CASES.

PAGES

Alpha, &c., Co. v. Massachusetts, 268 U. S. 203, 216..18, 22

Air-Way Electric Co. v. Day, 266 U. S. 71 .....18, 24, 42

Bekins, &c., Co. v. Riley, 280 U. S. 80, 82..... 45

Bethlehem Motors Co. v. Flynt, 256 U. S. 421.....17, 19

Campbell Baking Co. v. City, 19 Fed. (2d), 159..... 18

Consolidated Turnpike Co. v. Norfolk & Ocean Ry. Co., 228 U. S. 326 4

Cudahay Packing Co. v. Hinkle, 278 U. S. 460 24

Farmers L. & T. Co. Ex'r v. Minnesota, 280 U. S. 2..4, 13, 28

Frick v. Pennsylvania, 268 U. S. 473.....19, 28

Hanover Fire Ins. Co. v. Carr, 272 U. S. 494, 508 18

International Paper Co. v. Massachusetts, 246 U. S. 135 .....18, 19, 23

Liggett v. Baldridge, 278 U. S. 105, 113..... 43

Looney v. Crane, 245 U. S. 178 .....22, 24

Louisville & Interurban R. Co. v. Greene, 244 U. S. 499 14

Louisville Gas & Electric Co. v. Coleman, Auditor, 277 U. S. 32 .....4, 30, 31, 32, 33, 46

Love v. Griffith, 266 U. S. 32 4

Ludwig v. Western Union Tel. Co., 216 U. S. 146..... 18

Macallen v. Massachusetts, 279 U. S. 620..... 4, 44

New Jersey Bell Tel. Co. v. State Board, 280 U. S. 338 4

Northern Pacific Ry. Co. v. Department of Public Works, 268 U. S. 39 4

Pullman Co. v. Kansas, 216 U. S. 56..... 18

PAGES

Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389. 4, 48, 55

Rhode Island Trust Co. v. Doughton, 270 U. S. 69.... 19

Safe Deposit, &c., Co. v. Virginia, 280 U. S. 83..... 16

Southern Ry. Co. v. Greene, 216 U. S. 400..... 18

Stebbins v. Riley, 268 U. S. 137 42

Ward Baking Co. v. Fernandino, 29 Fed. (2d), 789.. 18

Western Union Tel. Co. v. Andrews, 216 U. S. 165.... 18

Western Union Tel Co. v. Kansas, 216 U. S. 1..18, 19, 24, 26

White River Lumber Co. v. Arkansas, 279 U. S. 692.. 4, 55

STATUTES.

Kentucky Statutes, Sec. 4085 (Carroll's 1915 Edition), (Acts 1906, c. 22, Art. IV, Sub-Div. 1, Sec. 9, p. 132). 34

Kentucky Statutes, Sec. 4088 (Carroll's 1915 Edition), (Acts 1906, c. 22, Art. IV, Sub-Div. 1, Sec. 12, p. 132). 34

Kentucky Statutes, Sec. 4088 (Carroll's 1922 Ed.), Acts May 2, 1917, c. 11, Sections 2 and 3.....34, 35

Kentucky Statutes, Sec. 4088 (Carroll's 1930 Edition), (Acts March 4, 1924, c. 116, p. 402, Sections 2 and 3). 2

Kentucky Statutes, Sec. 4123 (Carroll's 1930 Edition). 2

Kentucky Statutes, Sec. 4128 (Carroll's 1930 Edition). 2

Kentucky Stautes, Sec. 4189-1 and 4189-2 (Carroll's 1930 Edition). 25

Judicial Code, Sec. 237, Par. A. (United States Code, Title 28, Sec. 344, Amd. Sec. 861a-b). 4

United States Code, Title 28, Sec. 344 (Judicial Code, Sec. 237, Par. A), (Amd. Sec. 861a-b)..... 4

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 442.

JUNIUS C. KLEIN, - - - - - - *Appellant,*

v.

BOARD OF TAX SUPERVISORS OF JEFFERSON COUNTY, KENTUCKY, - - - - - *Appellee.*

Appeal from the Court of Appeals of the State of Kentucky.

BRIEF FOR APPELLANT.

STATEMENT.

This appeal (writ of error) is from a judgment of the Court of Appeals, the highest court of the State of Kentucky (R. 54), affirming a judgment of the Jefferson Circuit Court (R. 49), dismissing the appellant's appeal from the action of the Board of Tax Supervisors of Jefferson County, Kentucky (R. 1).

The facts of the case are as follows:

The County Tax Commissioner made an assessment of appellant's shares of stock in the Standard Sanitary

Manufacturing Company at $95.00 per share of *$25 par value*. As provided in Kentucky Statutes, Sections 4123 and 4128 (*printed in appendix, and as exhibit with printed statement complying with Rule 12 of the Court, hereinbefore filed*) appellant petitioned the Board of Tax Supervisors of Jefferson County to review the assessment (R. 4, *et seq.*, also R. 7, *et seq.*).

Failing to obtain relief appellant, as permitted by Kentucky Statutes, appealed to the Quarterly Court of Jefferson County (R. 11, *et seq.*), which affirmed the action of the Board of Tax Supervisors of Jefferson County; whereupon appellant appealed to the Jefferson Circuit Court (R. 21, *et seq.*).

The Jefferson Circuit Court made separate findings of law and facts (R. 43, *et seq.*), and held (R. 47, 48), that Kentucky Statutes, Section 4088, under which the assessment was made was constitutional, and not in violation of the uniform provisions of the State Constitution, and did not deny to the appellant the equal protection of the law. Accordingly the Court (R. 49) adjudged that the action of the Board of Tax Supervisors was sustained, and the valuation of $95 per share of $25 par, on the common stock of the Standard Sanitary Manufacturing Company approved; and that appellant's appeal be and it was dismissed.

The controlling Kentucky Statute, and the Statute assailed, is Section 4088, Carroll's Kentucky Statutes, 1930 Edition (Acts March 4, 1924, c. 116, p. 402, subsection 3), as follows:

"The individual stockholders of a corporation, at least seventy-five (75%) per cent of whose total property is taxable in Kentucky, shall not be required to list their shares for taxation so long as the corporation pays taxes on all its property in Kentucky (including the corporate franchise when the franchise is required to be assessed), provided the shareholder furnishes satisfactory proof to the taxing authorities that at least three-fourths of the total property of such corporation is taxed in Kentucky" (See appendix).

As the practice required, appellant filed grounds and moved the Court for a new trial, and upon the motion being overruled he prayed an appeal to the Court of Appeals, which was granted (R. 50). The Court of Appeals (R. 55) delivered its opinion June 21, 1929, and entered judgment (R. 54) as follows:

"The Court being sufficiently advised it seems to them there is no error in the judgment herein.

"It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

"It is further considered that the appellees recover of the appellants their costs herein expended."

The Court of Appeals, in its opinion aforesaid, decided against appellant his claim that to assess his shares aforesaid for taxation denied to him the equal protection of the laws guaranteed to him by the Fourteenth Amendment to the Federal Constitution.

JURISDICTION OF THE COURT.

This Court's jurisdiction of this appeal has already been confirmed on the printed statement hereinbefore filed in compliance with Rule 12 of this Court.

The jurisdiction of this Court over the appeal is sustained by Judicial Code, Section 237, Paragraph A, U. S. Code, Title 28, Section 344, and by the following cases interpreting the Federal legislation just noted:

Consolidated Turnpike Co. v. *Norfolk & Ocean Ry. Co.*, 228 U. S. 326.
Love v. Griffith, 266 U. S. 32.
Northern Pacific Ry. Co. v. *Department of Public Works, et al.*, 268 U. S. 39.
Louisville Gas & Elec. Co. v. *Coleman, Auditor*, 277 U. S. 32.
Quaker City Cab Co. v. *Pennsylvania*, 277 U. S. 389.
The Macallen Co. v. *Massachusetts*, 279 U. S. 620.
White River Lumber Co. v. *Arkansas*, 279 U. S. 692.
Farmers L. & T. Co., Ex'r., v. *Minnesota*, 280 U. S. 204.
New Jersey Bell Tel. Co. v. *State Board*, 280 U. S. 338 (January 6, 1930).

FINDINGS OF LAW AND FACTS.

The judgment of the Court of Appeals was based upon the separate findings of law and facts made by the Judge of the Circuit Court (R. 43, *et seq.*), as follows:

"This case having been submitted on the law and the facts, the pleadings, exhibits, and the stip-

ulations filed herein, and the deposition of Ben Marshall; Now the Court being fully advised, finds the facts in the case are as shown by the said stipulations filed herein by agreement of parties on April 12, 1927:

Stipulations.

"It is hereby agreed by counsel for appellant and by counsel for appellees that the following stipulations of facts shall be considered as conclusive evidence of said facts at the trial of this action subject alone to competency and relevancy.

"That the Standard Sanitary Manufacturing Company is a foreign corporation organized under, and by virtue of the laws of the State of New Jersey, and is duly authorized to do business in this State, and was so doing business in this State of Kentucky on the 1st day of July, 1924.

"That it had issued and outstanding on the 1st day of July, 1924, 805,106 shares of Common Stock, of which number 202,083 shares were held and owned by 1,028 persons, citizens and residents of, and domiciled in this State of Kentucky, on said 1st day of July, 1924, and all of whom have been assessed for 1925 State taxes on their respective holdings at the rate of $95.00 per share.

"That the total number of preferred shares of said company issued and outstanding on said 1st day of July, 1924, was 46,667 shares of which number 16,680 shares are held and owned by persons citizens and residents of the State of Kentucky.

"That said stockholders residing in Kentucky, own and hold in round figures, twenty-five per cent

(25%) of the total issue of said Common Stock and thirty-three per cent (33%) of the total issue of said preferred stock.

"That said Standard Sanitary Manufacturing Company, on the 1st day of July, 1924, held and owned properties and assets consisting of real estate and tangible personalty, located in Jefferson County, State of Kentucky, all of which was acquired and held by it for corporate purposes and all of which has been fully listed by said Company for assessment for 1925, State, County, City of Louisville taxes and for all other purposes, and duly assessed both by the Jefferson County Board of Tax Supervisors for State Taxes for the year 1925, and for all other purposes, at a total value of $2,263,390, which was its fair cash value estimated at the price it would bring at a fair voluntary sale, and which is over twenty-five per cent (25%) the total assessed value of its total properties in twenty-two states of the United States of America, in which states the Standard Sanitary Manufacturing Company has its properties and was doing business as of the 1st day of July, 1924; that the total assessed value of all of the said Standard Sanitary Manufacturing Company's assets and properties in said twenty-two states of the United States was $8,522,822.62, as of the 1st day of July, 1924. That the other 75% of its total properties, 85% of which consists of real estate and tangible personalty, is located and has a taxing situs on the 1st day of July, 1924, outside of, and beyond the limits of this State of Kentucky, all which properties have been duly listed by the said Standard Sanitary Manufacturing Company,

with the taxing authorities of every State in which its properties are located, and assessed by said taxing authorities for taxation, and for all purposes as required by the laws of said respective states or political subdivisions of same, and said Company has paid and is now paying all such taxes on same as they become due. That the foregoing assessed values and taxes do not include any license or franchise tax or income taxes, all of which have also been duly assessed against and paid by said Standard Sanitary Manufacturing Company; that the book value of the said shares of Common Stock of the said Standard Sanitary Manufacturing Company as of the 1st day of July, 1924, was $39.11 per share, and the par value of same was $25.00 per share. That there was no sale of said common stock had or made or reported by newspapers on the 1st day of July, 1924. That said Common Stock is only listed on the Stock Exchanges of the cities of Pittsburg, Pennsylvania, and Louisville, Kentucky.

"That the appellant is a citizen of the State of Kentucky, and resides in Louisville, Jefferson County, Kentucky, and was the owner and holder of 4,591 shares of the said Common Stock of the Standard Sanitary Manufacturing Company, on the 1st day of July, 1924, and duly listed said stock with the Jefferson County Tax Commissioners for taxation as of the 1st day of July, 1924, but claimed the said stock was non-assessable. That the said Jefferson County Tax Commissioner, over the protest and objection of the appellant valued said stock at the rate of $95.00 per share, which valuation was arrived at by him by averaging the sales

of small blocks of stock ranging from ten to twenty shares, as reported 'by the stock reports published in the newspapers of the cities of Louisville and Pittsburgh, as having been made in the week prior to and the week after the 1st day of July, 1924.'

"That appellant duly appeared in person, and by counsel, before the Jefferson County Board of Tax Supervisors on being notified of the action of the Jefferson County Tax Commissioner and filed with said Board his written objections and reasons therefor to the aforesaid assessment of his said common stock at $95.00 per share, for, and on behalf of himself and all other holders and owners of said stock, citizens and residents of the State of Kentucky, and who were likewise assessed with their respective holdings at the same rate of $95.00 per share, on the 12th day of March, 1925, at which time said Board was duly assembled and in session for the purpose of reviewing and correcting the assessments of persons where same were complained of.

"That appellant requested said Board to be allowed to produce proof to sustain his said objections at that time, or at such other time as said Board might fix. That said board declined and refused said request and acted thereon as shown by the judgment or order of Court herein of March 11, 1925, and sustained the assessment of said common stock as made by the Jefferson County Tax Commissioner at $95.00 per share, to all of which the appellant objected and his objection being overruled excepted at the time and still excepts.

"That during several months prior to July 1st, 1924, rumors were promulgated at the stock ex-

change of Louisville and Pittsburgh, and among the financial institutions of said cities, that a 40% stock dividend was expected to be declared and paid by the Standard Sanitary Manufacturing Company in the fall of 1924, in addition to the regular cash quarterly dividends *therefore* paid at $1.25 per share.

"That no stock dividend was declared or paid by said Standard Manufacturing Company on its Common Stock during the year 1924; but that a stock dividend of 25% was declared and paid on February 1st, 1925, and that the average market value of stock in December, 1924, was $117.00.

"That in no case has real estate in this state been assessed for taxation purposes at a speculative value due either to the favorable location of same in relation to the trend of business especially in the City of Louisville, or County of Jefferson, or to the pressing need of purchasers paying exorbitant prices for real estate to round out their holdings.

"That during a period of a month prior to the 1st day of July, 1924, and a month after said date, the number of shares of said Common Stock traded in and transferred on the books of the said Standard Sanitary Manufacturing Company was less than 5% of the total issue outstanding at the time."

"The Court further finds that the only other fact presented in the case is contained in the deposition of Ben Marshall, Secretary of the State Tax Commission of the State of Kentucky, which fact the Court finds to be that the assessment of real estate by the assessing authorities of the State of

Kentucky, in the County of Jefferson, State of Kentucky, for the year 1925 as of July 1, 1924, was had and made on a basis of 69.9 per cent of its fair cash value, estimated at what it would bring at a fair voluntary sale thereof, and that the ratio, or average, of the assessments for taxation of real estate in all of the counties of the State of Kentucky, for said year 1924, was between 65% and 70% of the fair cash values of same.

"The Court further finds as conclusions of law based on the above facts, that the assessments had and made by Jefferson County Tax Commissioner of the shares of stock of the Standard Sanitary Manufacturing Company held and owned by plaintiff, Junius C. Klein, and all other holders residing in Jefferson County, Kentucky, at a valuation of $95.00 per share for purposes of State taxation for the year 1925, was the full, fair cash value of same, as of the first day of July, 1924, estimated at what it would bring at a fair voluntary sale thereof; and that the assessment of said shares of stock as aforesaid *the* at the same time the Standard Sanitary Manufacturing Company was also assessed for purposes of State taxes for said year 1925, with its real estate and other property, situated in the State of Kentucky, was not double taxation;

"The Court further finds that assessment complained of herein of said shares of stock for State purposes, is not null or void and is not contrary to or in violation of the Constitution of the State of Kentucky, or the Constitution of the United States of America.

"The Court further finds that Section 4088 of the Kentucky Statutes under which the above assessment was made, is constitutional and not in violation of the uniform and equal provisions required by the State constitution in the assessment of properties for taxation purposes, and does not deny to the plaintiff the equal protection of the law. To each and every conclusion of law aforesaid, the appellant and all other holders and owners of said common stock who reside in Jefferson County, Kentucky, object and except."

It was sufficient, of course, that the Federal question was raised and decided adversely to us by the Court of last resort, but it was first raised in the Amended and Supplemental Statement of Appeal (R. 12); afterward in the Reformed Amended and Supplemental State of Appeal (R. 21-23), as well as in the separate Findings of Law and Facts (R. 43-48).

ASSIGNMENTS OF ERROR.

The assignments of error are as follows (R. 63):

"1. The Court of Appeals of Kentucky erred in affirming the judgment of the Jefferson Circuit Court sustaining the demurrer to plaintiff in error's petition, filed in this cause and dismissing plaintiff in error's petition.

"2. The Court erred in overruling plaintiff in error's contention that the statute in question, Section 4088, Kentucky Statutes, as amended by Acts of 1924 was in conflict with and in violation of the Fourteenth Amendment to the Constitution of the United States.

"3. The Court erred in holding that no right secured to the plaintiff by the Fourteenth Amendment to the Constitution of the United States was violated by the imposition by the defendants of the assessment complained of.

"4. The Court erred in holding and adjudging that the plaintiff was not by the assessment complained of deprived of its property without due process of law.

"5. The Court erred in holding that Section 4088, Kentucky Statutes (Carroll's 1922 edition) as amended by chapter 116, page 402, section 2, of the Acts of 1924 of the General Assembly of Kentucky, was not in conflict with or in violation of the Fourteenth Amendment to the Constitution of the United States.

"6. The Court erred in holding that said Section 4088, Kentucky Statutes, was not in conflict with Sections 170, 171 and 172 of the Constitution of the State of Kentucky.

"Wherefore the appellant prays that the said judgment be reversed and that the said Court of Appeals of Kentucky be ordered to enter a judgment reversing the judgment of the Jefferson Circuit Court, appealed from by the appellant to the said Court of Appeals of Kentucky, and directing the said Jefferson Circuit Court to enter judgment in appellant's favor, setting aside said judgment heretofore entered dismissing the plaintiff's petition and directing it to overrule the demurrer to said petition, and to hold the assessment complained of to be null and void and of no force and effect."

ARGUMENT.

The questions to be urged for reversal in this Court are:

(1) That the State courts and taxing boards deny to appellant the equal protection of the laws in assessing their property at 100%, while at the same time real estate was assessed in Jefferson County at 69.9% of its fair cash value, and in all the counties of Kentucky on an average of 65 or 70% of its fair cash value, the said assessment of the property of appellant and the shareholders of said corporation being intentionally, habitually and deliberately assessed at 100% of its value, while the real estate of other taxpayers of the counties of the State of Kentucky were intentionally, habitually and deliberately assessed at only 70% of its fair cash value.

(2) That inasmuch as the State cannot tax a foreign corporation's property outside the State, and can tax only the percentage of its property which may be in the State, it should not be possible to tax shares in the corporation held in the State, or, at most, tax them at a ratio in excess of the percentage by which the State could tax the corporations property.

(3) In sympathy with the principle just mooted, this Court is now restricting the rule under which double or multiple taxation has been allowed; see *Farmers L. & T. Co., Ex'r of Taylor* v. *Minn.*, 280 U. S. 204 (Jany. 6, 1930).

(4) Assuming, however, that the doctrine that the shareholder may be assessed on his shares at 100%,

regardless of what property of the corporation, if any, may be in the State of his domicile, nevertheless it is not within the power of the State to arbitrarily discriminate between corporations as to the taxation of their shareholders or their shares. Both corporation and the shareholders are interested to the contrary—the shareholder because the price of his shares is diminished, and the corporation because it cannot raise money in competition with its competitors in whose favor the discrimination is made. These considerations are regarded by this Court as of great importance because so large a part of the country's wealth is invested in negotiable securities.

A.

Equalization.

Confessedly appellant's stock was assessed at 100% —*appellant claims at very much more*—while real estate in Jefferson County was assessed at 69.9%, and real estate in all the counties of Kentucky on an average of 65 or 70%, so that appellant was denied the equal protection of the laws to the extent of 30%, or more.

The figures just given are sustained by the testimony of Ben Marshall, secretary of the State Tax Commission (R. 29), and the case is brought within the principle of *Louisville & Interurban R. Co.* v. *Greene,* 244 U. S. 499.

The Kentucky Court (R. 62) says:

> "Appellant cannot complain that land in Jefferson County is equalized at 70%; for land is

equalized in each county by the county board because land values depend on local conditions; but intangible property is equalized by the state board and is uniform throughout the state."

Just how this statement answers our claim that we were not given equalization we cannot see. If land in Jefferson County was equalized by the county board, and upon local conditions, why were we not entitled to equalization when our land was assessed at 100%, and other land in that county assessed at 69.9%? It matters not, therefore, whether the ratio between assessed and real value be taken in Jefferson County alone or taken in the whole State, for in either case we have been denied equalization.

The State Court does not, of course, controvert our claim that the assessment of real estate, both in Jefferson County and in the State of Kentucky, was systematically, habitually and intentionally assessed at 69.9% in Jefferson County, and 65 or 70% in the State, and indeed the testimony of Ben Marshall, of the State Tax Commission, implies such habitual, systematic and intentional assessment of real estate at the depressed values aforesaid.

B.

Taxation of Stock in the Ratio of the Property of the Corporation Held in the State of the Shareholder's Domicile to the Entire Property of the Corporation Held There and Elsewhere.

The State of the shareholder's domicile taxes his shares on the assumption that every share represents an aliquot part of all the property of the corporation wherever situate. The assumption that the shares are themselves property, and property located within the State is the veriest and most mischievous fiction. This Court has lately said, in *Safe Deposit, &c., Co.* v. *Virginia,* 280 U. S. 83 (Nov. 25, 1929):

> "And the fiction of *mobilia sequuntur personam* was intended for convenience, and not to be controlling where justice does not demand it."

Also (p. 94):

> "It would be unfortunate, perhaps amazing, if a legal fiction originally invented to prevent personalty from escaping just taxation should compel us to accept the irrational view that the same securities were within two states at the same instant and because of this to uphold a double and oppressive assessment."

Upon the assumption of the State's right to tax shares of its citizens, regardless of the paternity of the corporation, or the location of its property, the State has no just right to tax the shares at a rate in excess

of the ratio of property of the corporation within the State to all its property in all the States, if at all.

Bethlehem Motors Company v. *Flynt*, 256 U. S. 421, reversing 178 N. C. 399, 100 S. E. Rep. 693, is in its features most suggestive of the principle involved in the *instant* case.

The State Court in that case upheld the State Statute requiring payment of a license tax to sell automobiles in North Carolina and provided that 4/5ths of such taxes need not be paid if the Company had 3/4ths of its assets invested in the State and returned for taxation therein. The State Court, Clarke, C. J., held the statute unobjectionable, and the judgment of the State Court was reversed by this Court upon the ground that the statute caused discrimination between corporations. This Court's opinion is elaborate and important in solving the *instant* question.

The Bethlehem Motors case treated, of course, of license taxes on corporations, but the principle is equally applicable to the taxation of the capital stock of corporations, for neither directly taxes the property of the corporation. The license tax is a charge against the corporation and diminishes the value of the shares, and the *ad valorem* tax upon the shares of the shareholder diminishes the value of the shares; and, as we have just seen, unjust taxation of the corporation itself deprives the stockholder of his property, and unjust taxation of the stockholder injures the corporation correspondingly. For practical purposes, therefore—and this Court has lately remarked the practical effect of

taxation—the principle which condemns one of the taxes just mentioned is essentially applicable to the other taxes.

The Bethlehem Motors case was applied in *Ward Baking Co.* v. *Fernandino* (Fla.), U. S. D. C., 29 Fed. (2d) 789, where the Court said, among other things, that

> "the classification upon which the difference in tax is based is not according to occupation, but according to residence."

In *Campbell Baking Co.* v. *City* (D. C., Mo.), 19 Fed. (2d) 159, the case was similar to the Ward Baking Company case, and the Court held unconstitutional the ordinance in question upon the authority of *Pierce* v. *Society,* 268 U. S. 510.

We are unable to find other Federal citations of the Bethlehem Motors case.

The doctrine that a State has no authority, or jurisdiction, to tax the property of a foreign corporation situated outside the State is now too familiar to need citation of authorities to support it, but it has been applied so often by this Court that different developments of the principle are interesting; see:

Western Union Tel. Co. v. *Kansas,* 216 U. S. 1.
Pullman Co. v. *Kansas,* 216 U. S. 56.
Ludwig v. *Western Union Tel. Co.,* 216 U. S. 146.
Western Union Tel. Co. v. *Andrews,* 216 U. S. 165.
Southern Ry. Co. v. *Greene,* 216 U. S. 400.
International Paper Co. v. *Mass.,* 246 U. S. 135.
Air-Way Electric Co. v. *Day,* 266 U. S. 71.
Hanover Fire Ins. Co. v. *Carr,* 272 U. S. 494, 508.
Alpha, &c., Co. v. *Mass.,* 268 U. S. 203, 216.

Frick v. *Pennsylvania,* 268 U. S. 122.
Bethlehem Motors Co. v. *Flynt,* 256 U. S. 421.
Rhode Island Trust Co. v. *Doughton,* 270 U. S. 69.

International Paper Co. v. *Massachusetts,* 246 U. S. 135, expounds what is most cogent in our favor. It reaffirms the principle of the case of *Western Union Tel. Co.* v. *Kansas,* and other similar cases.

Massachusetts had laid a tax requiring every foreign corporation doing business in the State to pay an excise tax of 1/50th of 1% of the par value of its authorized capital stock, not exceeding a tax of $2,000 in any year, and also an excise tax of 1/100th of 1% of the par value of its authorized capital in excess of $10,000,000. The Company was a New York corporation with an authorized capital of $45,000,000, and its total assets were $39,000,000 or $40,000,000, of which not more than 1¾% were invested in Massachusetts. Its business was manufacturing and selling paper, and it operated twenty-three mills, of which only one was in Massachusetts. The output of its mills was sold both interstate and intrastate, principally the former. About 86% of the sales negotiated through the Massachusetts agency were interstate and 14% local. No goods were kept on hand from which current sales were made. The executive and financial offices were in New York. The corporation paid *ad valorem* taxes in Massachusetts. The *ad valorem* assessment was $472,000, and the tax paid thereon $8,118. The tax in controversy was in addition to the property tax, and amounted to $5,500. The State Court upheld the tax as a privilege tax.

This Court said, holding the tax invalid, that the general principles involved were so well established as to be no longer open to controversy. *Western Union Tel. Co.* v. *Kansas,* and other cases were reviewed, and the result stated as follows (p. 141):

> "1. The power of a State to regulate the transaction of a local business within its borders by a foreign corporation,—meaning a corporation of a sister State,—is not unrestricted or absolute, but must be exerted in subordination to the limitations which the Constitution places on State action.
>
> "2. Under the commerce clause exclusive power to regulate interstate commerce rests in Congress, and a state statute which either directly or by its necessary operation burdens such commerce is invalid, regardless of the purpose with which it was enacted.
>
> "3. Consistently with the due process clause, a State cannot tax property belonging to a foreign corporation and neither located nor used within the confines of the State.
>
> "4. That a foreign corporation is partly, or even chiefly, engaged in interstate commerce does not prevent a State in which it has property and is doing a local business from taxing that property and imposing a license fee or excise in respect of that business, but the State cannot require the corporation as a condition of the right to do a local business therein to submit to a tax on its interstate business or on its property outside the State.
>
> "5. A license fee or excise of a given per cent of the entire authorized capital of a foreign corporation doing both a local and interstate business

in several States, although declared by the State imposing it to be merely a charge for the privilege of conducting a local business therein, is essentially and for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property, including that in other States; and this because the capital stock of the corporation represents all its business of every class and all its property wherever located.

"6. When tested, as it must be, by its substance—its essential and practical operation—rather than its form or local characterization, such a license fee or excise is unconstitutional and void as illegally burdening interstate commerce *and also as wanting in due process because laying a tax on property beyond the jurisdiction of the State.*"

This Court added:

"True, those were cases where the business, interstate and local, in which the foreign corporation was engaged was that of a common carrier. But the immunity of interstate commerce from State taxation is not confined to what is done by the carriers in such commerce. On the contrary, it is universal and covers every class of interstate commerce, including that conducted by merchants and trading companies. And as respects the power of a State to tax property beyond its jurisdiction belonging to a foreign corporation, it is of no moment whether the corporation be a carrier or a trading company, for a State is wholly without power to impose such a tax."

After elaborate review of *Looney* v. *Crane,* 245 U. S. 178, and declaring that it was immaterial whether the violation of the Commerce Clause was great or small; and after expounding *Baltic Mining Co.* v. *Mass.,* 231 U. S. 68, this Court concluded (p. 145):

> "What has been said sufficiently shows that the tax in question should have been declared unconstitutional and void as placing a prohibited burden on interstate commerce and laid on property of a foreign corporation located and used beyond the jurisdiction of the State."

This decision, and the reasons given for it by this Court, are most important in the consideration of our case because although the Standard Sanitary Mfg. Co. was not a common carrier, it was a corporation with its headquarters in New Jersey, having property and transacting business in 22 States, and engaged in interstate commerce. It matters not, therefore, that the corporation was not a common carrier, such as the Louisville & Nashville Railroad Co., or the Illinois Central Railroad Company, operating railroads in and through the State of Kentucky, having less than 75% of its property in said State.

In *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203, this Court held that a State could not impose an excise tax on a foreign corporation doing an interstate business within its borders measured by the proportion of capital shares attributed to transactions therein, and the proportion of net income attributed to such transactions, since the tax would constitute an

unconstitutional burden on interstate commerce; *also that the State might not tax property beyond its borders under the guise of regulating or taxing intrastate business.*

The statute involved provided that every foreign corporation should pay annually for doing business in the State an excise of $5.00 per thousand on the value of the corporate excess employed within the State, and 2½% of that part of its net income derived from business transacted within the State; provided that the total tax should not be less than 1/20th of 1% of such proportion of fair cash value of capital stock as assets employed in the State bore to total assets.

The State's contention was that payment of the tax was not made a condition precedent to doing business; that the collection of the tax was to be made by ordinary methods; that there was no discrimination either against foreign corporations or interstate commerce, and that the taxes complained of were excise and not property taxes. It contended that being excises the taxes were not on property or net income, but were taxes measured by property and net income, used in or derived from business done in Massachusetts.

After reviewing *Cheney Bros.* v. *Mass.*, 246 U. S. 147; *International Paper Co.* v. *Mass, supra,* and other cases, this Court said (p. 218):

> "It must now be regarded as settled that a State may not burden interstate commerce or tax property *beyond her borders under the guise of regulating or taxing intrastate business.* So to burden

interstate commerce is prohibited by the Commerce Clause; and *the Fourteenth Amendment does not permit taxation of property beyond the State's jurisdiction.* The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, 87, tends to support a different view it conflicts with conclusions reached in later opinions and is now definitely disapproved." (Italics ours.)

In *Cudahay Packing Co.* v. *Hinkle,* 278 U. S. 460, this Court held that to exact license fees from a foreign corporation doing interstate business, based on authorized capital stock, where only a small part of its property was located within the taxing State and a relatively small proportion of its business there transacted, offended the Commerce Clause, notwithstanding the maximum fee exactable was limited; also held that where the fee was based upon authorized capital, and only a small part of the corporation's property was in the taxing State, and a relatively small part of its business there transacted, the fee constituted an interference with due process in attempting to tax property beyond the jurisdiction of the State, notwithstanding the fee was limited.

The tax was condemned on authority of *Looney* v. *Crane,* 245 U. S. 178, 187; *Alpha, &c.,* v. *Mass., supra,* and *Air-Way Electric, &c., Corp.* v. *Day,* 266 U. S. 71. Brandeis and Holmes, J. J., dissented.

The Legislature of Kentucky recognized the principle of *Western Union Tel. Co.* v. *Kansas, supra,* and

the subsequent cases involving the same principle, when providing for license taxes on corporations, and enacting Kentucky Statutes, Section 4189-1 and 4189-2 (Carroll's 1930 Edition); Acts 1926, c. 74, Sections 1 and 2, p. 203, as follows:

> "*Section 4189-1. License tax on corporations.*—Every corporation organized by or under the laws of this or any other state or government, owning property or doing business in this state, except foreign insurance companies, whether fire, life, accident, casualty or indemnity, foreign and domestic building and loan associations, banks and trust companies, and corporations which, under existing laws, are liable to pay a franchise tax, shall pay to this State, to be credited to the general expenditure fund, an annual license tax based upon the asset value of its capital stock, as hereinafter provided.
>
> "*Section 4189-2. Amount of tax.*—Every corporation shall pay an annual license tax of seventy cents on each one thousand dollars of that part of the asset value of its capital stock *represented by property owned and business transacted in this state,* which shall be ascertained by finding the proportion that the property owned and business transacted in this state bears to the aggregate amount of property owned and business transacted in and out of this state.
>
> "Provided, that such corporation may pay at said rate upon the entire asset value of its capital stock; and in that event it shall not be required to report as in subsection b of Section 4189-3 hereof. And its failure so to report shall be deemed con-

> clusive evidence that such corporation elects to pay upon the entire asset value of its capital stock, and it shall be its duty so to do, and the duty of the state tax commission so to fix its license tax accordingly. (Italics ours.)

Obviously, the principle expounded by this Court in *Western Union Tel. Co.* v. *Kansas,* and subsequent cases declaring the same principle, is persuasive of the point now made in the *instant* case, because taxation in the cases cited was imposed upon the amount of the capital stock of the corporations, and the Kentucky Statute now assailed by appellant imposes primarily taxes on the corporation's stock, but in the *instant* case the taxation is not imposed in proportion to the property of the corporation in the State but ownership by the corporation of 75% of its property taxable in Kentucky is selected as the criterion of taxation of the corporation's shares, and is selected as arbitrarily as 25% was selected in the earlier statute. So, in any aspect of the case now presented to this Court, the taxation of the stock of the Standard Sanitary Mfg. Co. is in its essence as objectionable as the license taxation based upon the entire authorized stock of the corporation in *Western Union Tel. Co.* v. *Kansas* and similar cases, albeit the taxes in those cases were laid directly upon the corporation itself.

C.

Unsoundness of Double or Multiple Taxation.

Upon principle it would seem inconceivable how it could ever have been supposed that taxation of the corporation's property and taxation also of the shares of its shareholders was not double taxation. It is comprehensible how a State, always desiring more revenue, and exercising the utmost ingenuity in expanding its search for something more to tax, should contend that the shareholder domiciled within its territory should be taxed because his shares were within reach, but while shares are available, they are so because they represent property, and when the property is in another State, taxation of the shares is taxation of property outside the jurisdiction of the taxing State. *There is no escape from this conclusion.* But such taxation has always been an abuse, and has led courts and legislatures into inextricable inconsistencies. These have of late been recognized as injustices and enormities.

It is especially in the imposition of multiple inheritance taxes that the absurdity has been most plainly exposed, but multiple taxation therein has been upheld upon the ground that inheritance taxes were excise taxes and not property taxes, and, consequently, not protected by the Fourteenth Amendment. This doctrine was announced in *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283; *Blackstone* v. *Miller,* 188 U. S. 189, and in *Wheeler* v. *Sohmer,* 233 U. S. 434; but this Court called a halt on the extension of the doctrine

in *Frick* v. *Pennsylvania*, 268 U. S. 473, and has now definitely condemned multiple taxation in inheritance tax cases in *Farmers L. & T. Co., Ex'r of Taylor*, v. *Minn.*, 280 U. S. 204, overruling *Blackstone* v. *Miller*, *supra*.

The principle at the base of the decision in *Farmers L. & T. Co., Ex'r of Taylor* v. *Minn.*, applies to the taxation of shares at the shareholder's domicile at 100% when the property represented by the shares lies wholly or partly in other States. In as much as inheritances cannot be taxed except in the State of the decedents' domicile when they consist of intangibles, or at the *locus in quo* when they consist of tangibles, because taxation belongs to the jurisdiction over the property in question—upon the same principle the shares of the shareholder in a corporation cannot *rightly* be taxed at all because to tax them amounts to taxation of property in another jurisdiction, *or, at most,* cannot properly be taxed in excess of the ratio of *net* property in the State of the domicile to property situate there and elsewhere.

It certainly appears strange that when, as this Court has lately said, taxation is something so practical, different States should have been permitted to multiply taxation and heap up subsidies without any real or substantial basis upon unsubstantial fictions, which were nothing but fictions. But this Court has now, in the Taylor case, *supra,* stripped the mask from the fiction and exposed it to destruction.

D.

Assuming the Propriety of Taxing Shares and Also Taxing the Property of the Corporation, the State of the Shareholder's Domicile has no Right to Arbitrarily Discriminate Between Corporations and Arbitrarily Select Those Whose Stockholders are to be Taxed and Omit to Tax the Stockholders of the Others.

If we assume, for argument's sake, that the shareholder may still be assessed at 100% regardless of what property, if any, of the corporation may be located within the State of domicile, it is not within the power of the State to arbitrarily discriminate between corporations in the taxation of their shareholders. Both corporation and the shareholder are interested to the contrary—the shareholder because the price of his stock is diminished, and the corporation because it cannot raise money in competition with its competitors in favor of whom the discrimination is made, if the competitor's shareholders are not taxed and its shareholders are taxed. The stock of the one will be diminished in the market by the amount of the tax, while the stock of the other remains undiminished.

Assuming, for illustration, that the stock of corporation "X" pays a 6% dividend and is taxed 50c on $100, and that corporation "Y" pays the same dividend but its stock is not taxed—the conditions of the two being otherwise equal—the yield of the stock of corporation "X" becomes 5½%, while that of corporation "Y" remains 6%. It is obvious that there would be no

market for the stock of corporation "X" when the money-lender could buy the stock of corporation "Y." It is, therefore, manifest not only that the Legislature has greatly discriminated between two corporations, to the great disadvantage of one, but has so discriminated upon a basis which is purely arbitrary.

By an Act of 1917 the shareholder was not taxed if 25% of the corporation's property was in Kentucky, and now by the Act of 1924, the shareholder is taxed unless at least 75% of the corporation's property be in Kentucky. The criterion adopted in either case is purely arbitrary. The only conceivable reason for substituting 75% of property for 25% thereof is that the shareholders of more corporations are reached by the later Statute, whereby the tax-eater gets more money. The legislation is purely arbitrary, and the so-called classification is not predicated upon any basis having reasonable relation to the classification made. That the legislation therefore offends the Fourteenth Amendment is demonstrable upon the authority of late decisions of this Court, aside from the consideration of earlier decisions.

The litigation in the State Court, culminating in the judgment appealed from, originated in *Middendorf* v. *Goodale* (Nov. 13, 1923), 202 Ky. 118, 259 S. W. 59, where the decision of the State Court upheld the Kentucky Statute later condemned by this Court in *Louisville Gas & Electric Company* v. *Coleman, Auditor,* 277 U. S. 32; reversing 213 Ky. 762, 281 S. W. 1017.

In *Louisville Gas & Electric Company* v. *Shanks, Auditor* (Coleman case), (March, 1926), 213 Ky. 762, 281 S. W. 1017—reversed 277 U. S. 32—the Statute considered in the Middendorf case was upheld, the Court basing its ruling upon the decision in that case, and declining to review its discussion made in the Middendorf case. The position taken by the State Court in the Shanks (Coleman) case was, therefore, repudiated by this Court.

In *Siler* v. *Board of Supervisors* (May 31, 1927), 221 Ky. 100, 298 S. W. 189, the Court, in an elaborate opinion, upheld the Statute which we now assail in the *instant* case, and cited as its authority the Middendorf case and its decision in the Shanks, or Coleman case, saying (p. 105):

> "The General Assembly enacted section 4019a-9, Ky. Stats., imposing what is known as the mortgage recording tax. This tax is imposed on mortgage indebtedness running five years or longer, but the tax is not imposed if the mortgage indebtedness runs less than five years. *This court upheld that statute,* and said there was no discrimination, as the General Assembly had the power to impose the mortgage recording tax on indebtedness running for five years or longer, and to exempt from the tax all indebtedness running for less than five years" (Citing the cases aforesaid in 202 Ky. 118, and 213 Ky. 762). (Italics ours.)

The Kentucky Court of Appeals, therefore, based the judgment from which we appeal upon the doctrine

of that court expounded in cases based upon the Registry Statute, afterward repudiated by this Court in *Louisville Gas & Electric Co.* v. *Coleman.*

It, therefore, logically follows that the judgment in the *instant* case should be reversed on the principle involved in the decision in the Coleman case (277 U. S. 32).

Our right to a reversal, however, is even stronger than the right of the plaintiff-in-error in the Coleman case was, because it was assumed, both by the majority and by the minority of the justices of this Court in that case, that the mortgage tax was a privilege tax, and not a property tax. The same position was taken elaborately by the State Court in the Middendorf case. Indeed, in that case the Court seems to have assumed that if the mortgage tax had been a property tax the decision would have been the reverse, for the Court recited (202 Ky. 126):

> "Our consideration of Section 4019a, Kentucky Statutes, has brought us to the conclusion that the tax imposed by it as a privilege tax; that is, a tax imposed upon the privilege of recording mortgages and instruments creating like liens, the payment of which is entirely optional with the owners or holders thereof."

Again (p. 127):

> "Another distinguishing feature of the mortgage recording tax is, that it is required to be paid but once; that is, when the mortgage is lodged for record; and this is so whether the ownership of

the mortgage be retained by the mortgagee or other beneficiary named therein, or shall pass by assignment to another.

"While what we have thus far said of the tax in question would seem *sufficient to show wherein it differs from the property tax,* a brief statement of the nature and characteristics of the latter tax will give emphasis to the differentiation" (Italics ours).

Again (p. 128):

"While this court has not heretofore been directly called upon to decide whether the tax in question is *a privilege* or *a property tax,* courts of last resort of several other States have declared such tax a privilege tax and sustained the constitutionality of statutes imposing it, the provisions of which are substantially the same as those contained in the statute of this State under consideration" (Citing authorities). (Italics ours.)

This Court, in *Louisville Gas & Electric Co.* v. *Coleman* (277 U. S. 32), said (p. 36):

"The state court of appeals, in disposing of the contention that the statute violated the state constitution, held that the tax imposed *was not a property tax but a privilege tax,* that is, a tax imposed upon the privilege of recording mortgages, etc., the payment of which, it was said, was entirely optional with the owners or holders thereof. This determination of the state court, in so far as it affects the challenge under the state constitution, we accept as conclusive, in accordance with

> the well-settled rule. *Merchants Bank* v. *Pennsylvania,* 167 U. S. 461, 462. But the State Court further held that the statute was not in conflict with the equal protection clause of the Fourteenth Amendment, and this presents a different question calling for our independent consideration and decision."

Our claim, therefore, to reversal is not necessarily impugned by the views of either the majority or the minority opinions in the Coleman case (277 U. S. 32, 41 *et seq.*), because a privilege tax may be upheld where an *ad valorem* property tax would not be, and a tax imposed on our stock is a property tax.

That the Statute under which the complaining stockholders in the *instant* case were taxed discriminates against them is illustrated by the history of legislation on the subject in Kentucky.

By Section 4085, Ky. Stats., *1915 Edition,* it was provided concerning stockholders of corporations (See Appendix).

> "and so long as said corporation pays the taxes on all its property of every kind, the individual stockholders shall not be required to list their shares in said corporation."

By the amendment of May 2, 1917, c. 11, Sec. 2, p. 45, it was enacted as Section 4088 (see Appendix):

> "The individual stockholders of a corporation, *at least one-fourth* of whose total property is taxable in Kentucky, shall not be required to list their shares for taxation so long as the corporation

pays taxes on all its property in Kentucky." (Italics ours.)

By the amendment of March 4, 1924, to Section 4088, ch. 116, Secs. 2 and 3, p. 402, the term "75 per cent" is substituted for the "25 per cent" in the statute of May 2, 1917. (*See statutes in full in the appendix.*)

So, from the legislation aforesaid, it is obvious that the present statute, which we now assail, is purely arbitrary, discriminating between corporations without any reasonable basis for classification having relation to the subject of the legislation.

The first statute exempted the shares if the corporation paid taxes on all its property in Kentucky—how much or how little the corporation might have in this State—provided the property was held for corporate purposes; the next statute taxed the shares where the corporation did not pay taxes in Kentucky *on at least one-fourth* of its total property, and the present statute taxes the shares except where the corporation pays taxes in Kentucky *on 75 per cent* or more of its total property. Obviously, the Legislature took no note of any *ratio* between the corporation's property in Kentucky and its property elsewhere.

The present statute, substituting *75 per cent* for *25 per cent* manifests the logical result of permitting the Legislature to ignore the Federal Constitution and act perfectly arbitrarily.

If the Legislature may act arbitrarily, it can provide for more taxes when the State, county and munici-

pal officers desire more taxes, *and may tax such classes of stockholders as it choose, and exempt others,* regardless of any reasonably applicable basis for classification.

Old world potentates issued their ukases for contributions or taxes when their extravagances required more money, until revolution came; we have not yet reached this point, but we are on the way, and in this country taxes have increased at an alarming rate, and if Legislatures may discriminate arbitrarily, taxing such as they desire and exempting others, there is no limit to arbitrary power in taxation and no safety for the taxpayer.

Obviously, while a proper classification for taxation might be reasonably based upon the ratio of *net* assets in the State to total *net* assets, no proper classification can be based upon *gross* assets because gross assets mean nothing in such a problem. For illustration, if a corporation had a million dollars' worth of assets unencumbered and taxed in Kentucky, and had no other property, the shares of the shareholders would be non-taxable under the present statute (Kentucky Statutes, Section 4088, as amended 1924), but if this corporation afterward purchased a million dollars' worth of real estate in Indiana on credit, executing to the vendor mortgage for the purchase money, the shareholders of the corporation would then become taxable, because the corporation would have only 50% of its property in Kentucky, although their shares

would be no more valuable than before, the corporation's *net* assets still remaining one million dollars.

From the foregoing review of the Kentucky Court's decisions on the Registry Statute, Sec. 4019a (the *Middendorf case*, 202 Ky. 118; the *Shanks or Coleman case*, 213 Ky. 762, 281 S. W. 1017) and the Siler case, 221 Ky. 100, 298 S. W. 189, involving Kentucky Statutes, Sec. 4088, under discussion in the *instant* case, it is manifest that the Kentucky Court found itself in an embarrassing predicament when it came to decide the *instant* case (Rec. 55—230 Ky. 182, 18 S. W. (2d) 1009), for in the *Siler case*, direct predecessor of the *instant* case, *and based upon the same statute*, the Court invoked as authority for upholding the statute its own previous decision upholding the Registry Statute, which this Court later held unconstitutional in 277 U. S. 32.

In the *Klein case*, however (230 Ky. 182, 186, 187), the State Court gives this explanation of this Court's decision in the *Coleman case* (277 U. S. 32):

> "In that case the Supreme Court reversed this Court, and held that the statute taxing mortgages running over five years and not taxing mortgages running five years or less was invalid, on the ground that the classification was arbitrary. It is insisted that the same rule should be applied here. *But the Court is unable to see that it has any application.* That case seems to rest upon the idea that long-time mortgages are made by corporations and short-time mortgages are made by the poor, whose credit is not good, and that the stat-

ute taxed the corporations and exempted from taxation individuals." (Italics ours.)

This Court certainly said nothing in the *Coleman case* to indicate that its decision rested upon the ground that the long-time mortgages were made by corporations and short-time mortgages by the poor, and that the statute was void for taxing corporations and exempting individuals; nor indeed did this Court hold that the statute taxed corporations and exempted individuals.

Why, then, the State Court said that this Court in the Coleman case had taken a distinction between taxing corporations and taxing individuals ("the poor"), and how the Court concluded that this Court's decision in the Coleman case had no application to the *instant* case, when that Court had cited in the Siler case (a case like the instant case and based on the same statute) its own decision on the mortgage registry statute, seems incomprehensible.

Inasmuch, however, as the State Court was bound to extricate itself from the predicament in which it found itself, of relying in the *Siler case* upon its previous decision in the *Coleman case,* and, now, of explaining why the *Coleman case had no application to the instant case* (which is like the Siler case), none of us can boast of having any greater ingenuity than the State Court exhibited in the explanation just instanced, *albeit that such explanation was futile.*

The State Court in the *instant* case had come to realize from the Coleman decision that classification by

the Legislature for taxation must be based upon conditions having reasonable relation to the classification made, wherefore the Court essayed to show a reasonable basis for the classification made by the Legislature in the *instant* case. Of course, no reasonable basis could be shown because none existed.

The Court, moreover, ventured this (p. 187):

> "There is a substantial reason for putting stockholders in corporations not paying taxes in Kentucky on so much of their property, on a different footing from those so paying taxes in Kentucky. When the corporation's property is all in Kentucky, and its property is all assessed and the taxes are paid thereon, the property so taxed has in fact borne its fair share of the public burden. Not to assess the stockholder on his stock then is simply to treat a corporation as a firm is treated."

This reasoning needs, we submit, little analysis, for when the Court speaks of some corporations not paying taxes and others paying taxes it says nothing to the point, because it gives no criterion for differentiation between the different corporations. *The door for arbitrary selection is left wide open.*

Nor does the Court progress an iota when it says "not to assess the stockholder on his stock," is simply to treat the corporation as a *firm* is treated, when all the corporation's property is in Kentucky, because if the stockholders of the corporation are to be treated as a firm in one case, no reason exists why they should not be treated as a firm for taxation purposes in all cases,

and if part of the corporation's property lies outside the State, then taxing the stockholders as a firm amounts to taxing property outside the State, and the State is taxing without jurisdiction to tax. Furthermore, for reasons hereinbefore given, there is no reasonable basis for taxing the shareholders where the corporation has 74% of its property in Kentucky, and omitting to tax them when it has 76% in this State.

The State Court, moreover, we submit, went far afield when explaining (p. 187):

> "The Legislature perceived that to do justice a line must be drawn; for, if 1 per cent of the property of the corporation was not assessed, injustice would be done to assess the stockholders, so to do substantial justice the Legislature fixed 75 per cent as the basis. But a large part of the property in any state is never assessed at its fair value. This is known of all men, and so the Legislature, when it came to consider whether stockholders in corporations should be taxed, where the corporation had paid taxes on all its property, did not require that the taxes should be paid by the corporation upon 100 per cent of its property, but fixed a basis of 75 per cent. The reason was to allow a margin. It was an effort to put everybody upon equality, and not to require the stockholders to pay when the corporation had paid on an assessment of its property as large as that of much of the property in the state. The act of the Legislature is simply an effort to approximate justice by a classification resting on reasonable grounds, which are familiar to any one who knows anything

> of the assessment of property in the state. The classification which the Legislature made was not in the interest of the poor man or against the corporation."

The record manifests nothing upon which to base the verbiage just quoted, nor anything in the discussion employed by the Court to show that the criterion adopted for taxing some and omitting to tax other stockholders was other than purely arbitrary. Indeed, the utter insufficiency of the language employed by the State Court to justify the decision of that Court in the *instant* case silently demonstrates the lack of any just basis for the decision. Reversal, therefore, of that decision would seem inevitable.

If any principle be deducible from the language just quoted, it would be that the stockholders of some corporations may be taxable and those of others not taxable, and that a line must be drawn somewhere, and therefore arbitrarily—and thus the State Court clashes with this Court's previous decision in the Coleman case, 277 U. S. 32.

We have only, however, to resort to the later decisions of this Court to demonstrate that the criterion adopted by the statute under discussion is purely arbitrary.

This Court has said, and has reiterated, that classification for taxation must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.

In *Stebbins* v. *Riley,* 268 U. S. 137, this Court (Stone, J.) announced the doctrine in regard to inheritance taxation.

In *Air-Way Electric Co.* v. *Day,* 266 U. S. 71, an Act imposing a tax on the entire authorized stock of a foreign corporation doing interstate business within the State, where the stock issued was much less than the authorized stock, was held in violation of the Commerce Clause. This Court in that case said that a tax on the privilege of transacting business in the State *should bear some relation to the value of the privilege.*

The Court held, furthermore, that stock authorized, but not issued, was not a reasonable measure of a tax to be imposed for the privilege of doing business in the State, saying (p. 85):

> "It is clear that the mere number of authorized non-par value shares is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of such annual fees. Such a classification is not based on anything having relation to the purpose for which it is made. *Southern Ry. Co.* v. *Greene,* 216 U. S. 400, 417; *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415. The act has no tendency to produce equality; and it is of such a character that there is no reasonable presumption that substantial equality will result from its application." (Citing divers authorities.)

The decision in the Air-Way Electric case illustrates and demonstrates the accuracy of our point hereinbefore made, that gross assets can not constitute a

just criterion for classification because gross assets are no more a reliable basis of value than is "authorized" stock. Gross assets are not, as this Court said of "authorized" shares, "*anything having relation to the purpose for which it* (classification) *is made.*"

In *Liggett* v. *Baldridge,* 278 U. S. 105, 113, the Statute required all owners of stock in a pharmacy corporation to be registered pharmacists, although the public health had been already sufficiently safe-guarded by other statutes. This Court condemned the Statute upon the ground that mere stock ownership in a corporation owning and operating a drug store could have no real or substantial relation to the public health, and that the Statute created an unreasonable and unnecessary restriction upon private business. The Court said (pp. 113, 114):

> "We take judicial note of the fact that the stock in these corporations is bought and sold upon the various stock exchanges of the country and, in the nature of things, must be held and owned to a large extent by persons who are not registered pharmacists. If detriment to the public health thereby has resulted or is threatened, some evidence of it ought to be forthcoming. None has been produced, and, so far as we are informed, either by the record or outside of it, none exists."

It is evident that in the cases which we are citing the legislation was purely arbitrary, was without reasonable application to what was legislated for or against, as is true of the legislation in the *instant* case.

In *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, this Court condemned a Statute of Massachusetts, the effect of which was to tax the income from non-taxable securities owned by a corporation. The enactment provided that the corporate income taxable should include "all interest and dividends except dividends on shares of stock of corporations organized under the laws of the Commonwealth and dividends in liquidation paid from capital," and this Court held that the Statute operated to tax Federal bonds and securities, but was unconstitutional.

In reaching its conclusion this Court announced salutary doctrines, *e. g.*, that the effect of the tax should be considered in determining the question of its validity. On this point this Court cited *Brown* v. *Maryland* (12 Wheat. 419, 444), and divers other cases. It discussed *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, pronouncing it an extreme example of measuring income from the property of a corporation by including non-taxable property.

The Court expounded the aphorism employed in *McCulloch* v. *Maryland* (4 Wheat. 316, 431) that "the power to tax involves the power to destroy," and said:

> "The principle, of course, is important only where the tax is sought to be imposed upon a non-taxable subject."

This Court said (p. 629), that courts should be acute in scrutinizing taxing acts like that there involved "to distinguish between an exaction which in

substance and reality is what it pretends to be, and a scheme to lay a tax upon a non-taxable subject by a deceptive use of words."

In *Bekins, &c., Co.* v. *Riley,* 280 U. S. 80, 82, the Court approved a legislative distinction between common carriers operating between *fixed termini* over public roads and other common carriers and private carriers on the ground that the classification was proper. The Court said:

> "The power of the State in respect of classification has often been declared by opinions here. We are unable to say that there was no reasonable basis for the one under consideration; the court below reached the proper result, and its decree must be affirmed. * * *
>
> "That a marked distinction exists between common and private carriers by auto vehicles appears from Frost v. Railroad Commission, 271 U. S. 582, * * * and Michigan Public Utilities Corp. v. Duke, 266 U. S. 570 * * *. Their use of the highways probably will be regular and frequent, and therefore unusually destructive thereto; also it will expose the public to dangers exceeding those consequent upon the occasional movement of other carriers." (Quaker City Cab Co. case, 277 U. S. 389 distinguished.)

Our discussion of the decisions of this Court bearing upon the question of proper classification of persons and objects for taxation has been made so elaborate in order to manifest that cases in point were not overlooked, and to assist the Court as far as we could;

but we submit that the decisions of this Court in *Louisville Gas & Electric Co.* v. *Coleman, Auditor,* 277 U. S. 32, and *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, are decisive of the *instant* case.

Louisville Gas & Electric Company v. *Coleman, Auditor,* 230 Ky. 182 (reversed 277 U. S. 32), was based upon the mortgage registry statute, as aforesaid, and the Kentucky Court's decision was cited as authority by that Court in the Siler case, and the Siler case was based on the same statute involved in the *instant* case, so that the Commonwealth cannot with propriety claim that the *instant* case is not controlled by the principle of the Coleman case.

It requires no concession by the Commonwealth, however, to establish the identity of principle in the cases.

The Statute involved in the Coleman case imposed a recording tax upon mortgages lodged for record where the indebtedness did not mature within five years, and exempted from the tax those maturing within five years. The State Court upheld the Statute and this Court condemned it, rejecting the criterion of distinction as arbitrary, and as having no reasonable relation to the subject of the legislation. This Court said of the Fourteenth Amendment (p. 37):

> "It does not, however, forbid classification; and the power of the State to classify for purposes of taxation is of wide range and flexibility, provided always, that the classification 'must be reasonable, not arbitrary, and must rest upon some ground of

difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415; *Airway Corp.* v. *Day,* 266 U. S. 71, 85; *Schlesinger* .v *Wisconsin,* 270 U. S. 230, 240. That is to say, mere difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' (Gulf &c. Co. v. Ellis, 165 U. S. 150, 155.) * * *

"* * * The application of the equal protection clause does not depend upon what name is given to the tax. Whether the tax now in question be called a privilege tax or a property tax, it falls in effect upon one indebtedness and not upon another where the sum of each is the same; where both are incurred by corporations or both by natural persons; where the percentage of interest to be paid is the same; where the mortgage security is identical in all respects; where, in short, the only difference well may be that one is payable in 60 months and the other in 59 months."

This Court said further, concerning the classification (p. 39):

"Such a classification is arbitrary. It bears no reasonable or just relation to the intended result of the legislation. * * *

"* * * It is said that it is a tax upon a privilege which the owner or holder of the instrument creating a lien is free to accept or reject. But for

practical purposes there is no such option, for, as this Court recently held, there is a practical necessity to record such instruments because, if not recorded, the statute overrides them in favor of purchasers without notice and creditors; and the choice is like one made under duress."

Quaker City Cab Co. v. *Pennsylvania*, 277 U. S. 389, equally conclusive of the *instant* case in our favor, is even more impressive because of the facts and of the discussion by the Justices.

The State Court's judgment assailed by the Cab Company taxed its gross receipts amounting to $6,049.94. The receipts were derived from the use of motors for transportation *intrastate*. The Cab Company was a New Jersey corporation doing business in Philadelphia. It had the competition of individuals and partnerships upon whose gross receipts no taxes were imposed, although corporations were not exempt from any taxes imposed on individuals or partnerships in the same business. Such corporations as the Cab Company, foreign and domestic, paid capital stock taxes on actual value of property, and a bonus of 1-3 of 1% on par value of all stock issued if a domestic corporation, and a like rate on capital employed in the State if a foreign corporation. The Cab Company's claim for relief was that the Act providing for the taxation in question violated the equal protection clause of the Fourteenth Amendment, and this Court sustained that claim. The discrimination complained of was, therefore, that corporations were taxed while in-

dividuals and partnerships engaged in the same business were not taxed.

This Court, Butler, J., said (p. 400):

"The equal protection clause extends to foreign corporations within the jurisdiction of the State and safeguards to them protection of laws applied equally to all in the same situation. Plaintiff in error is entitled in Pennsylvania to the same protection of equal laws that natural persons within its jurisdiction have a right to demand under like circumstances (262 U. S. 544, 550). The equal protection clause does not detract from the right of the State, justly to exert its taxing power or prevent it from adjusting its legislation to differences in situation or forbid classification in that connection, 'but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation.' (274 U. S. 490, 493). It is established that a corporation, by seeking and obtaining permission to do business in a State does not thereby become bound to comply with, or estopped from objecting to, the enforcement of its enactments that conflict with the Constitution of the United States. The right to withhold from a foreign corporation permission to do local business therein does not enable the State to require such a corporation to surrender the protection of the Federal Constitution (Citing divers authorities).

"* * * The words of the section are too plain to require explanation. They could not reasonably be given any other meaning. But, in any

event, a characterization of the tax by the state court is not binding here (*Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32; *St. Louis Compress Co.* v. *Arkansas*, 260 U. S. 346, 348). There is no controversy as to the application of the tax. Plaintiff in error assumes that the section covers its gross receipts, as held by the state court, but insists that the section is invalid because it does not extend to like receipts of natural persons and partnerships. * * * Here the tax is one that can be laid upon receipts belonging to a natural person quite as conveniently as upon those of a corporation. It is not peculiarly applicable to corporations as are taxes on their capital stock or franchises. It is not taken in lieu of any other tax or used as a measure of one intended to fall elsewhere. It is laid upon and is to be considered and tested as a tax on gross receipts; it is specifically that and nothing else.

"In effect Section 23 divides those operating taxicabs into two classes. The gross receipts of incorporated operators are taxed while those of natural persons and partnerships carrying on the same business are not. *The character of the owner is the sole fact on which the distinction and discrimination are made to depend.* The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the

subject of the legislation. *Power Co.* v. *Saunders, supra. No decision of this Court gives support to such a classification.* In no view can it be held to have more than an arbitrary basis. As construed and applied by the state court in this case, the section violated the equal protection clause of the Fourteenth Amendment." See *The Railroad Tax Cases,* 13 Fed. 722; *County of Santa Clara* v. *Southern Pacific R. R. Co.,* 18 Fed. 385; *Northern Pacific R. Co.* v. *Walker,* 47 Fed. 681. The tax cannot be sustained." (Italics ours.)

The exact application of the principle announced by this Court in the language just quoted to the *instant* case is immediately obvious. The Pennsylvania legislation was condemned because it imposed a tax upon corporations not imposed upon individuals and partnerships. In the *instant* case the Kentucky Statute imposed a tax upon the shareholders of corporations having not more than 74% of their property in the State, while omitting to tax the shares of stockholders of corporations having 76% or more of their property in the State. Manifestly, the selection of the criterion between taxability and non-taxability of shareholders was perfectly arbitrary, and not founded on any basis having reasonable, or, indeed, any relation to the subject of the legislation.

The position of the dissenting opinion sharply points the contrast between the position of the Cab Company and that of the State. The dissenting opinion declared (p. 405):

> "The fundamental question requiring decision is a general one. Does the equality clause prevent a State from imposing a heavier burden of taxation upon corporations engaged exclusively in intrastate commerce, than upon individuals engaged under like circumstances in the same kind of business? The narrower question presented is, whether this heavier burden may be imposed by a form of tax 'not peculiarly applicable to corporations.' That is, by a tax of such a character that it might have been extended to individuals if the legislature had seen fit to so do."

The decision of this Court, therefore, was that a heavier burden could not be imposed upon corporations than upon individuals by a form of tax "not peculiarly applicable to corporations," or, as stated in the dissenting opinion, "a tax of such a character that it might have been extended to individuals if the Legislature had seen fit to do so."

The tax imposed by Pennsylvania was, therefore, a tax which the Legislature might have extended to individuals had it seen fit to do so, but which it arbitrarily determined not to impose—and the legislative action was condemned by this Court. Its action was arbitrary, as was the action of the Kentucky Legislature in arbitrarily selecting first 25% of the corporation's property, and afterward 75% of such property as criterion for State taxation.

A prominent statement of the dissenting opinion further sharply emphasizes the issue decided by this Court in the Cab case, viz. (p. 406):

"The difference between a business carried on in corporate form and the same business carried on by natural persons is, of course, a real and important one. As was stated in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 161, 162, 'it could not be said * * * that there is no substantial difference between carrying on of business by the corporations taxed, and the same business when conducted by a private firm or individual. The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals.' Because of this difference Congress has repeatedly discriminated against incorporated concerns and in favor of the unincorporated."

An examination of *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, shows that all the references therein made which are quoted *supra,* were made with reference to excise taxes, and can, therefore, have no application to the *instant* case which involves solely a property tax. The language in the Flint case in regard to classification of the subjects of taxation refers to excise taxes based upon the existence of the privileges enjoyed by corporations and not by individuals, and could not apply to the *instant* case where the corporations whose stockholders are exempted have the same privileges as the corporations whose stockholders are taxed—the criterion between taxability and non-taxability being

selected arbitrarily and based solely upon the amount of the corporation's gross taxable property in the State, *which amount has no reference whatever to the percentage of the corporation's property within the State in comparison with its total property there and elsewhere,* much less to a comparison of *net* assets. The criterion in the Kentucky statute is therefore selected arbitrarily, and without any regard whatever to any fact, circumstance or condition reasonably applicable to the subject of the legislation.

If the criterion selected under the Kentucky Statute for taxing the stockholders of some corporations and omitting to tax others be upheld, then there is no conceivable percentage of a corporation's property that might not, with equal propriety, be selected as the criterion of taxation as that which was selected by the Kentucky Statute. Twenty-five per cent was first selected, then 75 per cent. Any other percent may hereafter at any time be selected if the Statute be upheld.

If any discrimination whatsoever might be made in taxation in favor of the individual against a corporation on the ground that it is a corporation, although the basis of the discrimination has no relation to any characteristic or privilege of the corporation, then the equal protection clause of the Fourteenth Amendment, it seems to us, might as well be abrogated—indeed would be abrogated. The same, we submit, would be true if a State might distinguish between two corporations in the taxation of its stockholders where the

ground of distinction would be as applicable to the stockholders of one corporation as the other.

To enact, consequently, that the stockholders of a corporation having 74% of its property in Kentucky should be taxable while the stockholders of a corporation having 76% would be non-taxable—or *vice versa*—establishes a criterion of taxability having no relation whatever to the peculiar features of corporate entity, or privileges, and is purely arbitrary.

It is, therefore, we submit, clear that the principles established in the *Louisville Gas & Electric* case and the *Quaker City Cab case* prove that Section 4088, Kentucky Statutes, as amended in 1924, violates the equal protection clause of the Fourteenth Amendment, and is unconstitutional.

Other late cases such as *New York* v. *LaTrobe,* 279 U. S. 421; *International Shoe Co.* v. *Shartel,* 279 U. S. 692, and *White River L. Co.* v. *Arkansas,* 279 U. S. 692, decided questions, and announced principles, irrelevant to those involved in the *instant* case. In the last-named case the Court distinguished the *Quaker City Cab* case discussed *supra.*

CONCLUSION.

The Fifth Amendment to the Constitution is an article of the Bill of Rights, and the Fourteenth Amendment, as now invoked, is but the extension of the principle of the Bill of Rights to the States. The equal protection clause of the Fourteenth Amendment is the shield of the people against arbitrary and tyrannical

legislative action. If the Legislature can arbitrarily select which members of a class it will tax and which members thereof it will exempt, then that clause of the Fourteenth Amendment is a dead letter. The importance of this case therefore is paramount as effecting future taxation. A reversal is respectfully prayed.

JUNIUS C. KLEIN,
JOHN P. HASWELL,
BLAKEY HELM,
EDMUND F. TRABUE,
Counsel for Appellant.

JOHN S. MILLIKEN,
Of Counsel.

APPENDIX.

Sec. 4085, Carroll's Kentucky Statutes, 1915 Edition, c. 108, p. 2068 (Acts 1906, c. 22, Art. IV, Subdiv. 1, Sec. 9, p. 132).

"Sec. 4085. (9) *Property to be assessed in name of corporation—penalty for failure to report—exemption of stockholders.* The property of all corporations, except where herein differently provided, shall be assessed in the name of the corporation in the same manner as that of a natural person, except that, when legally called on, the chief officer shall report a full statement of the property of such corporation for taxation, and, for a failure, shall be subject to the penalties in this article provided; and so long as said corporation pays the taxes on all its property of every kind, the individual stockholders shall not be required to list their shares in said corporation."

Sec. 4088, Carroll's Kentucky Statutes, 1915 Edition, c. 108, p. 2070 (Acts of 1906, c. 22, Art. IV, Subdiv. 1, Sec. 12, p. 132).

"Sec. 4088. (12) *When Stockholders are exempt.* The idividual stockholders of the corporation which are, by this article, required to report and pay taxes upon their corporate franchise, shall not be required to list their shares in such companies so long as the corporations pay the taxes on the corporate property and franchises as herein provided."

Kentucky Statutes, Sec. 4088, Carroll's 1922 Edition (Acts May 2, 1917, c. 11, Sections 2 and 3, p. 45).

"2. *Property to be Assessed in Name of Corporation—Penalty for Failure to Report.* The property of all corporations, except where differently provided by law, shall be assessed in the name of the corporation in the same manner as that of a natural person, except that, when legally called on, the chief officer shall report under oath a full statement of the property of such corporation for taxation, and, for a failure, shall be subject to the penalties provided by law for a similar failure by a natural person in listing his own property."

"3. *Exemption of Stockholders.* The individual stockholders of a corporation, at least one-fourth of whose total property is taxable in Kentucky, shall not be required to list their shares for taxation so long as the corporation pays taxes on all its property in Kentucky (including the corporate franchise when the franchise is required to be assessed), provided the shareholder furnishes satisfactory proof to the taxing authorities that at least one-fourth of the total property of such corporation is taxed in Kentucky."

Ky. Stat's. sec. 4088, Carroll's Ed. 1930. (Acts March 4, 1924, c. 116, p. 402, Sec. 2 and Sec. 3.)

"Sec. 2. That section 3 of chapter 11 of the Acts of the Extraordinary Session of the General Assembly of 1917, approved May 2, 1917, be amended by repealing said section 3 and inserting in lieu thereof the fol-

lowing, so that when said section is amended by substituting and re-enacting the following in lieu thereof, the same shall read as follows:

"Sec. 3. The individual stockholders of a corporation, at least seventy-five (75%) per cent of whose total property is taxable in Kentucky, shall not be required to list their shares for taxation so long as the corporation pays taxes on all its property in Kentucky (including the corporate franchise when the franchise is required to be assessed), provided the shareholder furnishes satisfactory proof to the taxing authorities that at least three-fourths of the total property of such corporation is taxed in Kentucky."

Sec. 4123 Carroll's Kentucky Statutes, 1930 Edition.

"*Sec. 4123. Reconvening to hear complaints; witnesses.* The board, in reassembling, shall hear all complaints and pass upon the assessment of all taxpayers, and for that purpose the board, in counties having therein a city of the first or second class, shall remain in session not less than one nor more than ten days, and in other counties not less than one nor more than five days. The board may summon and swear witnesses and require them to testify. Any person who shall wilfully fail to obey the summons of the board or shall refuse to testify before it when required shall be deemed guilty of a misdemeanor, and, on conviction, be fined not less than twenty-five dollars ($25.00) nor more than one hundred dollars ($100.00) for each of-

fense." (Id. Sec. 9, as amd. April 11, 1917, c. 1, p. 3, Sec. 27.)

"*Sec. 4128. Errors do not invalidate assessment; appeal.* Any informality or irregularity in the execution of their duties as supervisors and any failure of duty on their part shall not render any assessment invalid. But any taxpayer feeling himself aggrieved by the action of said board of supervisors may appeal to the quarterly court within thirty days after the final adjournment of said board by filing with the judge of said court a certified copy under the hand of the clerk of said board of the action of said board. He shall have the right to appeal from the decision of the quarterly court to the circuit court and then to the court of appeals in the same manner that the law now allows appeals in civil cases. It shall be the duty of the county attorney to represent the board in all such suits pending before the quarterly or circuit court, and it shall be the duty of the attorney general to represent the board in the court of appeals. When any such appeal is taken it shall be the duty of the county attorney to forthwith notify the state tax commission in writing of such appeal, and if he fails to so notify the state tax commission within ten days after such an appeal has been taken to the quarterly court he shall be guilty of a misdemeanor and upon conviction may be fined in any sum not to exceed one hundred dollars ($100.00). If the county attorney or sheriff feel that the state, county or any taxing district has been aggrieved by the action of the board of supervisors, or on account

of the failure of said board to act, then either of said officers may appeal to the quarterly court by filing with the judge thereof a brief statement showing the action of the board of supervisors or stating wherein it failed to properly act. The quarterly court shall hear evidence and pass upon all such appeals and either of said officers or tax commission may appeal to the circuit court and then to the court of appeals the same as in other civil cases. It shall be the duty of the county attorney to represent the interest of the state and county in all such appeals in the quarterly and circuit court, and it shall be the duty of the attorney general to represent the interest of the state and county in the court of appeals. Where an appeal is taken by the county attorney or sheriff as herein provided, it shall be the duty of the county attorney to notify the state tax commission in like manner as when an aggrieved taxpayer appeals, and if he fails so to do he shall be subject to a like penalty." (Id., Sec. 14, as amd. April 11, 1917, c. l., p. 3, Sec. 32.)

Section 4189-1, 4189-2 Carroll's Kentucky Statutes, 1930 Edition, (Acts 1926, c. 74, Sections 1 and 2).

"*Section 4189-1. License tax on corporations.* Every corporation organized by or under the laws of this or any other state or government, owning property or doing business in this state, except foreign insurance companies, whether fire, life, accident, casualty or indemnity, foreign and domestic building and loan associations, banks and trust companies, and corporations

which, under existing laws, are liable to pay a franchise tax, shall pay to this State, to be credited to the general expenditure fund, an annual license tax based upon the asset value of its capital stock, as hereinafter provided.

"*Section 4189-2. Amount of tax.* Every corporation shall pay an annual license tax of seventy cents on each one thousand dollars of that part of the asset value of its capital stock represented by property owned and business transacted in this state, which shall be ascertained by finding the proportion that the property owned and business transacted in this state bears to the aggregate amount of property owned and business transacted in and out of this state.

"Provided, that such corporation may pay at said rate upon the entire asset value of its capital stock; and in that event it shall not be required to report as in subsection b of Section 4189-3 hereof. And its failure so to report shall be deemed conclusive evidence that such corporation elects to pay upon the entire asset value of its capital stock, and it shall be its duty so to do, and the duty of the state tax commission so to fix its license tax accordingly."

Judicial Code, Sec. 237, Par. A. (United States Code, Title 28, Sec. 344—Amd. Sec. 861a-b.)

"*344. (Judicial Code, section 237, amended). Appellate jurisdiction of decrees of State courts; certiorari.* (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity

of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.

"*Sec. 861a. Writ of error abolished; substitution of appeal.* The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

"*Sec. 861b. Statutes governing writs of error to apply to appeals.* The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."